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Federal Communications Commission Office of the Secretary

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STATE OF NEW YORK **EXECUTIVE DEPARTMENT**

STATE CONSUMER PROTECTION BOARD

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☐ REPLY TO:

99 WASHINGTON AVENUE ALBANY, NEW YORK 12210-2891 (518) 474-3514

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June 24, 1992

Donna R. Searcy, Secretary Federal Communications Commission 1919 M Street N.W. Washington, D.C. 20554

> Re: the Matter of the Telephone Consumer Protection/Act of 1991: CC

> > Docket No. 92-90

Dear Secretary Searcy:

Enclosed please find an original and nine (9) copies of the Consumer Protection Board's (CPB) Reply Comments in the above cited proceeding.

The CPB requests that each Commissioner receive a personal copy of our Reply Comments.

Thank you for your assistance in this matter.

Very truly yours,

Acting General Counsel

LF/sk

Enclosures

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Re:

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The New York State Consumer Protection Board (CPB) submits these Reply Comments in response to the Notice of Proposed Rulemaking ("Notice") adopted on April 10, 1992 seeking comment related to the Federal Communication various issues Commission's ("FCC" or "Commission") implementation Telephone Consumer Protection Act of 1991 ("TCPA" or "the Act"). among other things, Although TCPA and the Notice address, autodialers and facsimile machines, the CPB confines its comments to the sections of the Notice relating to residential telephone solicitation.

I. The Need for Restrictions on Residential Telephone Solicitation

Section 227(c)(1) of TCPA requires the Commission to initiate a rulemaking proceeding concerning the need to protect residential telephone subscriber's privacy rights to avoid receiving telephone solicitations to which they object. Initially, we note that the Notice implies that TCPA leaves the decision as to whether to issue regulations restricting residential telephone solicitation to the FCC. 1 However,

Specifically, the Commission requested comments in Paragraph 26 of the Notice on "whether regulation of live solicitation may be necessary to protect residential subscribers' privacy rights" and in Paragraph 24 the Commission "tentatively

section 227(c)(2) clearly <u>requires</u> the Commission to issue regulations on residential telemarketing. Therefore, as the National Consumers League's (NCL) comments indicate, there is no need for the FCC to solicit views on the <u>need</u> for regulation of telephone solicitation:

The clear intent of the Act is to direct the Commission to determine the best methods to meet needs which are specifically enumerated in the Act. The question of need itself is no longer at issue. Congress has established public policy in this area; and the President has endorsed that policy by approving the Act.

"Comments of the NCL, " p.12.

Even assuming that the need for any regulation were at issue, the evidence suggests that consumers are in fact angry about the nuisance and invasion of privacy presented by residential telephone solicitation. For example, 55% of those responding to the 1991 Harris-Equifax Consumer Privacy Survey indicated that they viewed residential telephone solicitation as a nuisance, and 27% saw it as an invasion of privacy. Consumer Privacy Survey, 1991, p.3.

Further, in light of the findings contained in section two of TCPA that the nuisance presented by telemarketing is a matter of Congressional concern, it would be inappropriate for the Commission to issue regulations limited to deceptive practices associated with telemarketing. It is true that over half the states presently have statutes which restrict various uses of the telephone for marketing. Congress found, however, that telemarketers can evade state prohibitions through interstate operations. TCPA, §2(7).

Moreover, we disagree with the implication in Paragraph 26 of the Notice that FCC regulation of auto dialers or recorded messages is not necessary, or not a priority, due to the adequacy of present state and federal remedies in the area of deceptive practices, particularly the existence of state attorneys-general and the Federal Trade Commission. Many state deceptive practices statutes, such as §349 of the New York State General Business Law, do not prohibit conduct that is not deceptive. Therefore, state attorneys-general presumably do not have jurisdiction to resolve most complaints concerning calls using auto dialers or recorded messages, which are a nuisance to consumers but do not involve deceptive practices such as

conclude[d] that it is not in the public interest to eliminate
[the receipt of unsolicited sales calls]."

fraudulent sales pitches.² The Federal Trade Commission ("FTC") can only take enforcement action concerning a small minority of complaints it receives. In addition, consumers do not have a private right of action for violations of the Federal Trade Commission Act.

II. Regulatory Alternatives Available to Restrict Residential Telephone Solicitation

The Notice sought comments on five specific mechanisms to restrict live operator telephone solicitation to residential telephone customers: national or regional databases of persons who object to receiving telephone solicitations; network technologies that enable called parties to avoid calls from certain numbers; company generated "do not call" lists; special directory markings; and, time of day restrictions.

The CPB agrees with commenters such as the New York State Public Service Commission (PSC) and the National Consumers League (NCL) that a single national database of those subscribers who do not wish to receive telemarketing calls is the most efficient, effective and economical way to accomplish the Congressional mandate to protect the privacy rights of residential telephone subscribers. First, a national database would be the easiest and cheapest for business to comply with -- a telemarketer need only purchase a copy of or access to the electronically generated or hard copy version of the database.

Additionally, as the NCL implies, a national database would be the most easily enforceable of the five proposed alternatives, particularly by individual consumers harmed by unwanted sales calls. Section 227(c)(5) of the TCPA provides a private right of action for any person who has received more than one telephone call within any 12-month period by the same entity in violation of the Commission's regulations. Businesses which have established and implemented reasonable practices and procedures to effectively prevent calls in violation of the Commission's regulations are provided with an affirmative defense. Presumably, under a system using a national database, the only factual inquiries necessary in a lawsuit in which a business raised this defense would be whether the business utilized the national database, and whether it effectively directed and trained its staff regarding its use.

In contrast, under other proposed alternatives, fact-finding would be much more difficult. For example, if company-generated "do not call" lists were selected by the Commission, the court

 $^{^2}$ Section 45 of the Federal Trade Commission Act (15 U.S.C. § 45) prohibits "unfair or deceptive acts or practices in or affecting commerce," by way of comparison, section 349 of the New York State General Business Law prohibits only "deceptive acts or practices," but not "unfair" acts or practices.

would be forced to delve into the development of the specifics of the defendant's database or "do not call" list, in addition to such issues as staff training and practices.

Further, the CPB agrees with the NCL that the Commission should adopt regulations which provide consumers with an inexpensive and simple method to remove their names from telemarketing lists. We agree that the U.S. Postal Service's Change of Address form could be easily adapted to indicate whether or not the postal patron wishes to receive telemarketing solicitations. "Comments of the NCL," p.5.

Moreover, CPB agrees with the New York State Public Service Commission that the FCC should promulgate rules for the effective handling of customer complaints concerning telemarketing activities. It is axiomatic that a successful enforcement program against telephone solicitation depends on the consumer's "easy access to a complaint process that brings swift resolution to allegations of abuse." PSC Comments, p.2.

Finally, I note that the Notice does not solicit comments concerning several important matters which section 227(c) of the Act requires the FCC to consider, including whether there is need for additional Commission authority to further restrict residential telephone solicitation. TCPA, §227(c)(1)(D). Therefore, it appears that the Commission should issue a Further Notice of Proposed Rulemaking in this proceeding or accept the recommendation of the NCL to rescind its April 10th Notice.

The Consumer Protection Board appreciates the opportunity to present its views on the important issue of residential telephone solicitation, and to make recommendations in this proceeding.

Richard M. Kessel Executive Director

fully

By: Bob Cohen, Esq.

Senior Consumer Affairs Attorney

submitted,